(1) Supreme Court, U.S.
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No. 03-147 SEP 17 2003

In The

Supreme Court of the United States

DAVID SMITH, Warden

Petitioner,

v.

GERALD McKENZIE,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

PETITION FOR WRIT OF CERTIORARI

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112 pp

QUESTIONS PRESENTED FOR REVIEW

I. Whether an order from a State appellate court denying a discretionary application for leave to appeal "for lack of merit in the grounds presented," with no other explanation, constitutes an adjudication on the merits under 28 U.S.C. § 2254(d) that is entitled to deference in federal habeas corpus proceedings.

II. Whether a Court of Appeals on review of a motion for permission to file a second or successive petition for habeas corpus relief under 28 U.S.C. § 2244(b)(3), may *sua sponte* declare that a movant is entitled to a merits review of his claims in the district court, thereby abrogating the state's procedural defenses.

III. Whether the Court of Appeals may grant relief on a claim raised in a successive habeas petition that had been decided against a habeas corpus petitioner in a previous petition when no new reliable evidence supporting constitutional error was ever presented.

TABLE OF CONTENTS

QUESTIONS PRESENTED FOR REVIEW i
TABLE OF CONTENTS ii
TABLE OF AUTHORITIES iii
OPINIONS BELOW 1
JURISDICTION 2
CONSTITUTIONAL AND STATUTORY PROVISIONS 3
STATEMENT OF THE CASE 3
REASONS FOR GRANTING THE WRIT 7
I. There is a conflict among the circuits as to whether an unexplained order of the State court is entitled to deference under 28 U.S.C. § 2254(d) 7
A. The Michigan Court of Appeals' order denying discretionary leave to appeal "for lack of merit in the grounds presented" is an adjudication on the merits that is entitled to deference 9
B. There was sufficient evidence to support the conviction. 12
II. The Court of Appeals' decision rested on an improper order previously issued that required the District Court to review the habeas corpus petitioner's claims on the merits. 15
III. The Court of Appeals granted habeas corpus relief on a claim that had already been decided against the petitioner. 19
CONCLUSION 21

TABLE OF AUTHORITIES

Cases

Aycox v. Lytle,
196 F.3d 1174 (10th Cir. 1999)..... 8
Barefoot v. Estelle,
463 U.S. 880 (1983)..... 16
Barnes v. Elo,
2003 U.S. App. LEXIS 16265 (6th Cir. Mich 2003)..... 11
Bell v. Jarvis,
236 F.3d 149 (4th Cir. 2000) (en banc),
cert denied 534 U.S. 830 (2001)..... 8
Bovee v. Coopers & Lybrand CPA,
272 F.3d 356 (6th Cir. 2001)..... 17
Broadus-Bey v. Diamond,
264 F.2d 242 (6th Cir. 1959)..... 19
Coleman v. Thompson,
501 U.S. 722 (1991)..... 10
Estelle v. McGuire,
502 U.S. 62 (1991)..... 13
Hameen v. Delaware,
212 F.3d 226 (3d Cir. 2000) *cert denied*
532 U.S. 924 (2001)..... 9
Harris v. Stovall,
212 F.3d 940 (6th Cir. 2000)..... 9
In Re Byrd,
269 F.3d 561 (6th Cir. 2001)..... 19, 20
In Re Winship,
397 U.S. 358 (1970)..... 12
Jackson v. Virginia,
443 U.S. 307 (1979)..... 12, 14, 15
Kline v. Burke Const. Co.,
260 U.S. 225 (1922)..... 17

Kuhlmann v. Wilson,
477 U.S. 436 (1986) 19
McCleskey v. Zant,
499 U.S. 467 (1991) 19
McKenzie v. Smith,
326 F.3d 721 (6th Cir. 2003) ..... passim
Mullaney v. Wilbur,
421 U.S. 684 (1975) 13
Oviedo v. Jago,
809 F.2d 326 (6th Cir. 1987) 13
People v. Ginther,
390 Mich. 436 (1973) 5
People v. McKenzie,
424 Mich. 902 (1986) 1
People v. McKenzie,
434 Mich. 878 (1990) 1
Sanders v. United States,
373 U.S. 1 (1963) 19
Sawyer v. Whitley,
505 U.S. 333 (1992) 19
Schlup v. Delo,
513 U.S. 298 (1995) 16, 19
Schoenberger v. Russell,
290 F.3d 831 (6th Cir. 2002) 8, 9
Sellan v Kuhlman,
261 F.3d 303 (2d Cir. 2001) 9
Summer v. Mata,
449 U.S. 539 (1981). 10
Thompson v. Bell,
315 F.3d 566 (6th Cir. 2003) 8
Towns v. Smith,
2003 U.S. Dist. LEXIS 10772
(E.D. Mich. June 25, 2003) 11
United States v. Castaneda,
16 F.3d 1504 (9th Cir. 1994) 13
United States v. Walker,
915 F.2d 1463 (10th Cir. 1990) 17

Warren v. Smith,
161 F.3d 358 (6th Cir. 1998) 11, 12
Washington v. Schriver,
255 F.3d 45 (2d Cir. 2001) 8
Waters v. Kassulke,
916 F.2d 329 (6th Cir. 1990) 13

Statutes

28 U.S.C. § 1254(1) 2
28 U.S.C. § 1291, *et seq.* 17
28 U.S.C. § 2244(b) 16, 19, 20
28 U.S.C. § 2244(b)(1) 19
28 U.S.C. § 2244(b)(2) 2
28 U.S.C. § 2244(b)(3) ..... i, 5
28 U.S.C. § 2244(b)(3)(B)(C) 16
28 U.S.C. § 2244(b)(3)(D) 17
28 U.S.C. § 2244(b)(3)(E) 18
28 U.S.C. § 2254 19
28 U.S.C. § 2254(d) ..... i, 7
28 U.S.C. § 2254(d)(1) 8, 9, 12
28 U.S.C. § 2254(e)(1) 11
M.C.L. 750.83 12

Rules

M.R.E. 803(2) 12

OPINIONS BELOW

McKenzie's conviction was affirmed on September 19, 1985 by the Michigan Court of Appeals. *People v. McKenzie,* No. 80131. App. 63a. His application for leave to appeal was denied by the Michigan Supreme Court on March 26, 1986. *People v. McKenzie*, No. 77352, 424 Mich. 902 (1986). App. 62a.

McKenzie then filed his first federal habeas corpus petition which was denied by the U.S. District Court for the Eastern District of Michigan on January 29, 1987. *McKenzie v. Foltz*, No. 86-CV-74475-DT. App. 56a. McKenzie returned to state court and filed a delayed application for leave to appeal in the Michigan Court of Appeals which was denied on June 30, 1989, "for lack of merit in the grounds presented." *People v. McKenzie*, No. 116499. App. 55a. McKenzie filed a delayed application for leave to appeal to the Michigan Supreme Court, and this was denied on February 26, 1990. *People v. McKenzie*, No. 86893, Michigan Supreme Court, 434 Mich. 878 (1990). App. 54a.

McKenzie filed a second petition for a writ of habeas corpus in the United States District Court for the Western District of Michigan which was dismissed pursuant to the abuse of the writ doctrine on January 27, 1992. *McKenzie v. Haskell,* No. 2: 90-CV-300. App. 52a. McKenzie's application for a certificate of probable cause to appeal was denied by the Court of Appeals on May 14, 1992. *McKenzie v. Haskell*, No. 92-1283. App. 49a.

McKenzie returned again to the state trial court and filed a Motion for Relief from Judgment which was denied on January 18, 1995 pursuant to M.C.R. 6.508(D). *People v. McKenzie*, Detroit Recorder's Court No. 84-1886. App. 47a. The Michigan Court of Appeals denied leave to appeal the trial court's decision on June 10, 1996. *People v. McKenzie*, No.

191695. App. 46a. The Michigan Supreme Court denied McKenzie's delayed application for leave to appeal on March 28, 1997. *People v. McKenzie,* No. 106965. App. 45a.

McKenzie then returned to the federal court and pursuant to the requirement of 28 U.S.C. § 2244(b)(2) filed a motion in the Court of Appeals for an order authorizing a third federal habeas corpus petition. The motion seeking permission to file a successive petition was deemed unnecessary by the court. Court of Appeals Order dated May 11, 1999, No 98-0157. App. 43a. The case was transferred to the United States District Court for the Western District of Michigan and eventually to the United States District Court for the Eastern District of Michigan. After an evidentiary hearing conducted on December 5, 2000, the District Court adopted the Magistrate Judge's Report and Recommendation and denied the petition on June 4, 2001. *McKenzie v. Smith*, No. 99-70316. App. 14a. On April 23, 2003 the Court of Appeals reversed the judgment of the District Court and remanded the case to District Court to issue the writ of habeas corpus. *McKenzie v. Smith*, 326 F.3d 721 (6th Cir. 2003). App. 1a. This State's petition for an *en banc* rehearing was denied on June 19, 2003. App. 74a.

JURISDICTION

The Court of Appeals' decision reversing the District Court's denial of habeas corpus relief was entered on April 23, 2003. The state's petition for en banc rehearing was denied on June 19, 2003. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS

The constitutional and statutory provisions involved in this petition are as follows:

United States Constitutional Amendment XIV, § 1:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

28 U.S.C. §§ 2241, 2244, 2254. The text is set out in the Appendix. App. 76a.

STATEMENT OF THE CASE

Gerald McKenzie, a state prisoner, was granted habeas corpus relief by the Court of Appeals, which concluded that insufficient evidence had been presented to sustain the conviction of assault with intent to murder. Quattura Sutton, the three-year-old daughter of McKenzie's live-in girlfriend, was beaten and left to die in a bitterly-cold abandoned building. She was found by a construction worker on his way to work with her head frozen to the floor with her own blood. The victim was the only eyewitness and she identified McKenzie as the perpetrator during her recovery in the hospital, saying to her grandmother, "See, Grandma, what my daddy did to me." Quattura referred to McKenzie as "daddy" although she was not his child.

The parties agreed that Quattura was not competent to testify. The prosecutor offered the child's statement through the grandmother's testimony and, over McKenzie's objection, the trial court found the statement to be admissible under Michigan law.

Additional circumstantial evidence was presented tying McKenzie to the crime. Evidence indicating that McKenzie was angry with the child's mother due to her infidelity, that McKenzie was found outside in the early morning, and that he was seen coming from the direction of the abandoned building was also presented.

McKenzie appealed his conviction as of right. On September 19, 1985, the Michigan Court of Appeals, in a *per curiam*, unpublished opinion, affirmed McKenzie's conviction and sentence. App. 63a. On March 26, 1986, the Michigan Supreme Court denied leave to appeal. App. 62a.

McKenzie, *in pro per*, filed his first petition for a writ of habeas corpus in the United States District Court for the Eastern District of Michigan on October 23, 1986 raising the same three claims as he had in the Michigan Supreme Court. On January 29, 1987, the district court denied the petition. App. 56a.

On April 7, 1989, McKenzie returned to state court and filed an application for delayed leave to appeal in the Michigan Court of Appeals raising five issues. On June 30, 1989, the Michigan Court of Appeals entered an order denying the delayed application for leave to appeal "for lack of merit in the grounds presented." App. 55a. On August 15, 1989, McKenzie filed a delayed application for leave to appeal in the Michigan Supreme Court which was denied February 26, 1990. App. 54a.

On November 30, 1990, McKenzie filed his second petition for a writ of habeas corpus raising five claims. The second petition was dismissed by the United States District Court for the Western District of Michigan pursuant to the "abuse of the writ" doctrine on January 27, 1992. App. 52a. McKenzie's application for a certificate of probable cause to appeal the dismissal was denied by the Court of Appeals on May 14, 1992. App. 49a.

Thereafter, McKenzie returned to the state trial court and filed a motion for relief from judgment or, in the alternative, for a *Ginther*[1] hearing. The trial court denied McKenzie's motion for relief from judgment. App. 47a. McKenzie filed a delayed application for leave to appeal the trial court's denial of his motion for relief from judgment in the Michigan Court of Appeals, which denied leave to appeal. App. 46a. McKenzie filed a *pro se* delayed application for leave to appeal in the Michigan Supreme Court, presenting the same claims presented to the Michigan Court of Appeals, which was also denied. App. 45a.

Pursuant to the requirements of 28 U.S.C. § 2244(b)(3), McKenzie then filed a motion in the Court of Appeals for an order authorizing the district court to consider a successive habeas corpus petition on the grounds that: (1) his conviction is not supported by sufficient evidence; and (2) he received ineffective assistance from his trial and appellate counsel. The Court of Appeals held, App. 43a-44a:

> [T]he requirements contained in 28 U.S.C. § 2244 do not apply to this case, because applying these requirements would have an impermissible retroactive

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[1] *People v. Ginther,* 390 Mich. 436, 443 (1973), requires a convicted person who is claiming ineffective assistance of counsel based on facts not of record to present those facts at the trial court level in the form of a motion for a new trial.

> effect on McKenzie's conduct that predates the passage of the [AEDPA] . . . which enacted the current version of § 2244 . . . Although McKenzie has filed two prior petitions, which may have rendered his proposed petition a successive or abusive petition, we conclude that McKenzie has facially met the gateway standard for permitting review of his claims in order to prevent a fundamental miscarriage of justice. *See Schlup v. Delo*, 513 U.S. 298, 316-17 (1995). Thus, he is entitled to review of the merits of his two asserted claims.
>
> Accordingly, the motion seeking permission to file a successive § 2254 habeas corpus petition is hereby denied as unnecessary, and this case is herby transferred, pursuant to 28 U.S.C. § 1631, to the United States District Court for the Western District of Michigan for further proceedings, which may well include an evidentiary hearing to examine both claims, but especially the merits of McKenzie's claim of ineffective assistance of trial and appellate counsel.

The case was then transferred to the United States District Court for the Eastern District of Michigan. After an evidentiary hearing conducted on December 5, 2000, the District Court adopted the Magistrate Judge's Report and Recommendation and denied the Petition on June 4, 2001. App. 14a. The Court of Appeals, however, reversed the district court's denial of the writ on April 23, 2003. The court concluded that the Michigan Court of Appeals order of June 30, 1989, denying the claims "for lack of merit in the grounds presented" was not an adjudication on the merits because the order was not explained and was therefore not entitled to deference. The Court of Appeals then reviewed the claim *de novo* and granted habeas corpus relief. M*cKenzie v. Smith,* 326 F.3d 721 (6th Cir. 2003). App. 1a.

REASONS FOR GRANTING THE WRIT

I. There is a conflict among the circuits as to whether an unexplained order of the State court is entitled to deference under 28 U.S.C. § 2254(d).

Habeas relief can be granted only under limited circumstances where a state court has made an adjudication on the merits. Relief can be granted only if the decision is "contrary to or an unreasonable application of clearly established Federal law" or the decision is based on an "unreasonable determination of the facts. . . ." 28 U.S.C. § 2254(d) states:

> An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim—
>
> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

The question in this case is whether, when a State appellate court order specifically states that relief is denied "for lack of merit in the grounds presented," the federal courts must accord the deference required by the Anti-Terrorism and Effective Death Penalty Act (AEDPA). The Sixth Circuit Court of Appeals determined that the Michigan Court of Appeals' form order was not an adjudication on the merits. It

then reviewed McKenzie's insufficiency of evidence claim *de novo* and granted relief.

There is, as the Sixth Circuit acknowledged in *Thompson v. Bell*, 315 F.3d 566, 585 (6th Cir. 2003) an "inter-circuit debate regarding the proper interpretation of 'adjudicated on the merits' as that term is used in § 2254(d)(1)." One view directs the federal habeas courts to evaluate the State court result and not the reasoning process. *Washington v. Schriver*, 255 F.3d 45, 53 (2d Cir. 2001). *See also, Bell v. Jarvis*, 236 F.3d 149, 163 (4th Cir. 2000) (en banc), *cert. denied* 534 U.S. 830 (2001); *Aycox v. Lytle*, 196 F.3d 1174, 1178 (10th Cir. 1999). The Sixth Circuit has recognized the split among the federal circuits. In *Schoenberger v. Russell*, 290 F.3d 831, 838-9 (6th Cir. 2002) Judge Keith stated in his concurring opinion:

> Several circuits have discussed whether cursory treatment of a federal claim, such as that ordinarily found in a summary order, is an "adjudication on the merits." See *Sellan v. Kuhlman*, 261 F.3d 303, 309-315 (2nd Cir. 2001); *Green v. Johnson*, 116 F.3d 1115, 1120-1121 (5th Cir. 1997); *Delgado v. Lewis*, 181 F.3d 1087, 1093 (9th Cir. 1999); *Aycox v. Lytle*, 196 F.3d 1174, 1177-1178 (10th Cir. 1999). Uniformly, these circuits have held that a federal court should not refuse to apply § 2254(d) based on the quality of state court decisions.

In short, a state court declaration that a determination was made on the merits is sufficient to be considered "adjudicated on the merits" under § 2254 (d)(1). It is the result and not the rationale that is controlling.

On the other hand, other circuits would find that unexplained summary dismissals of federal claims are not "adjudications on the merits." *Washington*, 255 F.3d at 54

(summarizing argument that State court must make its rationale "at least minimally apparent"). See *Hameen v. Delaware*, 212 F.3d 226, 248 (3d Cir. 2000) *cert. denied* 532 U.S. 924 (2001).

A. The Michigan Court of Appeals' order denying discretionary leave to appeal "for lack of merit in the grounds presented" is an adjudication on the merits that is entitled to deference.

Before the present case, the Sixth Circuit had held that unexplained orders of denial on the merits were sufficient to be considered "adjudicated on the merits" under § 2254(d)(1). See *Harris v. Stovall,* 212 F.3d 940, 943 (6th Cir. 2000) (habeas court should focus on the result of the State court's form order). In the present case, however, the Court of Appeals declined to examine the results because the Michigan court had not explained its order. The very approach taken below would, as Judge Keith noted, "place us in the position of dictating to state courts that they must issue opinions explicitly addressing the issues presented or face 'second guessing' by the federal court." *Schoenberger, supra,* 290 F.3d at 839, quoting *Sellan v Kuhlman,* 261 F.3d 303, 312 (2d Cir. 2001).

McKenzie first presented his insufficiency of evidence claim to the Michigan Court of Appeals in his delayed application for leave to appeal dated March 29, 1999. The fourth claim of that application asked:

> Whether or not there was insufficient evidence to sustain the verdict of guilty of assault with intent to commit murder beyond a reasonable doubt as mandated by the sixth and fourteenth amendments, and art 1, sec's 17 and 20, Const. Mich., 1963.

The Michigan Court of Appeals denied the insufficiency claim along with McKenzie's four other claims stating, App. 55a:

> The Court orders that the delayed application for leave to appeal is DENIED for lack of merit in the grounds presented.

The Court of Appeals, in reviewing the third habeas petition, discounted the State court order completely because it was not a "reasoned" opinion and somehow determined that, "...the Michigan appellate court considered the admissibility of the evidence but not its sufficiency to support McKenzie's conviction." *McKenzie,* 326 F.3d at 726. App. 9a-10a. The Court of Appeals found that, "...there are simply no results, let alone reasoning, to which this Court can defer." *McKenzie*, 326 F.3d at 727[2], App. 10a.

The Michigan Court of Appeals specifically denied McKenzie's insufficiency of the evidence claim "for lack of merit in the grounds presented." The Sixth Circuit disregarded the plain language of the Michigan court's order and concluded that McKenzie's insufficiency claim had never been decided on the merits by the State courts and further determined that, as a result, it was not required to apply the deferential standard mandated by the AEDPA. App. 10a.

This Court has stated that federal courts "have no power to tell state courts how they must write their opinions." *Coleman v. Thompson*, 501 U.S. 722, 739 (1991). A state court need not elaborate or give reasons for rejecting claims that regards as frivolous or totally without merit. *Summer v. Mata*, 449 U.S. 539, 548 (1981). The decision below renders these principles meaningless. The result here is to require an explanation of every order in every state criminal case. This would effectively prohibit the use of standard form orders. Already at least one panel of the Court of Appeals and one District Court

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[2] The Court of Appeals previously declined to issue a certificate of probable cause as to the same claim in 1992.

have relied on *McKenzie* as authority for requiring *de novo* review when the State court did not address a claim in a "reasoned" opinion. See, *Barnes v. Elo*, 2003 U.S. App. LEXIS 16265 (6th Cir. Mich 2003); *Towns v. Smith*, 2003 U.S. Dist. LEXIS 10772 (E.D. Mich. June 25, 2003)*21.

The Court of Appeals decision also contravenes the AEDPA requirements that federal courts must apply the presumption of correctness to State court findings on habeas corpus review unless clear and convincing evidence is offered to rebut this presumption. *Warren v. Smith,* 161 F.3d 358, 360-361 (6th Cir. 1998); 28 U.S.C. § 2254(e)(1). The Court of Appeals provided no explanation whatsoever as to how it arrived at the conclusion that the Michigan appellate courts had never considered McKenzie's insufficiency claim. The Court of Appeals indicates that it reviewed the record but it contains no reference to any part of the record that would support its finding. App. 9a-10a.

The Michigan Court of Appeals order, which rejected the insufficiency claim, provides no basis for the Sixth Circuit's conclusion. The Michigan Court of Appeals, in fact, clearly rejected all of McKenzie's claims on the merits and, contrary to the Sixth Circuit's interpretation of the order, gave no indication that it had considered the admissibility of the evidence but not the merits of McKenzie's insufficiency claim. Thus, the Sixth Circuit had no basis, and unless this Court holds that state courts must explain all orders, had no authority to examine the sufficiency claim *de novo* because the Michigan Court of Appeals denied all of McKenzie's claims, "for lack of merit in the grounds presented." App. 55a.

The consequence of the Court of Appeals' decision is to improperly impose a requirement that the State courts must fully explain the rationale behind every decision in order to avoid a federal court *de novo* review using pre-AEDPA standards, thereby circumventing the requirements of *Jackson*

v. Virginia, 443 U.S. 307 (1979) and 28 U.S.C. § 2254 (d)(1). Even under pre-AEDPA standards, the court must decide whether *any* rational trier of fact could have found the elements beyond a reasonable doubt. *Jackson* at 319.

B. There was sufficient evidence to support the conviction.

The Due Process Clause protects a criminal defendant from being convicted of a crime without proof of every element of the crime. *In Re Winship,* 397 U.S. 358, 364 (1970). McKenzie was convicted of assault with intent to commit murder in violation of M.C.L. 750.83.

> In Michigan, the crime of assault with intent to commit murder requires proof of three elements: "(1) an assault, (2) with an actual intent to kill, (3) which, if successful, would make the killing murder." [*Warren*, 161 F.3d at 361 (citations omitted.)]

The Court of Appeals acknowledged that these three elements of the crime were proven but, contrary to the Michigan court's ruling rejecting McKenzie's claim of insufficiency of the evidence, the court questioned "...whether the evidence was sufficient to establish, beyond a reasonable doubt, that McKenzie was the perpetrator of the assault." *McKenzie* 326 F.3d at 727. App. 11a. While acknowledging that the admissibility of the child's statement implicating McKenzie was a question of state evidentiary law which is not reviewable in a federal habeas action, the Court then suggested that the child's statement naming her attacker was improperly admitted due to the "lack of any corroborating evidence." *McKenzie,* 326 F.3d at 728. App. 13a. The Court made much of the fact that the child was not competent to testify at trial. However, the statement was properly admitted under State law under an exception to the hearsay rule as an excited utterance pursuant to M.R.E. 803(2). *People v. McKenzie,* No. 80131,

Michigan Court Appeals, September 19, 1985, p 5. App. 71a-72a.

Federal habeas courts have no authority to interfere with matters of state law. Errors in the application of state law are not to be questioned in habeas courts. *Estelle v. McGuire,* 502 U.S. 62, 72 (1991); *Waters v. Kassulke,* 916 F.2d 329, 335 (6th Cir. 1990). It is not the role of a federal habeas court to act as an additional state appellate court to review a state court's interpretation of its own law. *Oviedo v. Jago,* 809 F.2d 326, 328 (6th Cir. 1987). State courts are the ultimate expositors of state law. *Mullaney v. Wilbur,* 421 U.S. 684, 691 (1975).

The Court of Appeals determined that the grandmother's testimony repeating the child's statement should not have been admitted. The Court concluded that without the child's statement the evidence identifying McKenzie as the perpetrator was insufficient. Despite the State court's holding that the statement was admissible under Michigan law, the Court of Appeals concluded that the fact that the order was unexplained allowed it to re-evaluate the circumstances of the child's out-of-court statement and permitted it to declare it to be inadmissible hearsay.

This conclusion was incorrect. In reviewing a sufficiency claim a habeas court should consider all evidence, including improperly admitted evidence. "In evaluating the evidence, we consider all of the evidence presented at trial, including evidence that was improperly admitted." *United States v. Castaneda,* 16 F.3d 1504, 1510 (9th Cir. 1994). Because the Court declined to consider the child's statement, it held that corroborating evidence was necessary to support the statement and then improperly determined the remaining evidence was insufficient to identify McKenzie as the perpetrator.

A reasonable trier of fact could have concluded that McKenzie was the perpetrator of the assault even without

Quattura's statement. The prosecution argued that McKenzie was upset that his girlfriend Kim was going out with other men and that he became frustrated and beat Kim's child. McKenzie was angry with Kim because of her affairs with other men. (Transcript II, pp 23-24) Quattura had been left by Kim in McKenzie's care. (Transcript II, p 15) McKenzie was seen outside of the house early in the morning on the day of the incident. (Transcript II, pp 68-69) Significantly, McKenzie was seen at that time "coming down the street...from toward Lawton." (Transcript I, p 114) Quattura was found in an abandoned apartment building on Lawton Street. (Transcript I, pp 80-81) That building was only a block and a half from where McKenzie had been living with Quattura and Kim. (Transcript I, p 115) A reasonable juror could also have considered it to be an indication of guilt that McKenzie tried to blame the child's mother for taking her outside without proper clothing, and might have found it important that McKenzie was found in his bed crying shortly after the assault. (Transcript II, pp 71, 103). While Quattura's statement to her grandmother, "See, Grandma, what my daddy did to me" was important testimony, it was not the only evidence presented. A rational trier of fact could have agreed with the prosecution that McKenzie exacted revenge against his girlfriend on her child because of Kim's affairs with other men. The jury might also have considered that McKenzie's judgment was clouded by his extensive drug use.

The Court of Appeals had no right to reweigh the evidence and, in fact, should have considered *only* evidence favorable to the prosecution. Under *Jackson* the Court of Appeals was obligated to review all of this evidence deferentially. "Once a defendant has been found guilty of the crime charged, the factfinder's role as weigher of the evidence is preserved through a legal conclusion that upon judicial review *all of the evidence* is to be considered in the light most favorable to the prosecution." *Jackson*, 443 U.S. at 319 (emphasis in original). The Court of Appeals, however, ignored all of the

prosecution's evidence and focused only on testimony favorable to McKenzie. The Court of Appeals characterized the prosecution's evidence as "circumstantial" and disparaged it stating:

> However, there were other people in the home on the morning Quattura was assaulted.. Additionally, there was no physical evidence or eyewitness testimony linking McKenzie to the assault on Quattura. Family members testified that they had never seen McKenzie harm Quattura and could not imagine that he would. *McKenzie,* 326 F.3d at 728.

There could hardly be a more striking example of a reviewing court making an independent decision as to guilt. *Jackson* clearly states that a reviewing court may not "ask itself whether *it* believes that the evidence at trial established guilt beyond a reasonable doubt." *Jackson,* 443 U.S. at 318-319.

The Court of Appeals determined that the unexplained order of the state court allowed it to review McKenzie's claims *de novo*. This led to its conclusion that the child's statement naming the attacker was improperly admitted under state law and should be disregarded. In examining the remaining evidence, the court did not view the evidence in the light most favorable to the prosecution, as required by *Jackson,* and improperly found that evidence to be insufficient.

II. The Court of Appeals' decision rested on an improper order previously issued that required the District Court to review the habeas corpus petitioner's claims on the merits.

The Court of Appeals' decision in this case reversed the District Court's denial and granted McKenzie habeas corpus relief on a claim raised in his third federal habeas petition. The very same claim, that the evidence was insufficient to sustain

his conviction, was raised in 1992 in McKenzie's second habeas action. That petition was denied as an abuse of the writ by the District Court (App. 52a-53a) and the Court of Appeals denied a certificate of probable cause (App. 49a-50a) on the grounds that the claim did not raise a substantial showing of the denial of a constitutional right. *Barefoot v. Estelle*, 463 U.S. 880, 893 (1983).

In 1998, McKenzie filed a motion requesting the Court of Appeals to authorize the filing of his third federal habeas petition. Because he had been denied habeas relief on two previous occasions, he was required, under 28 U.S.C. § 2244(b)(3), to seek an order directing the District Court to accept his third petition. The statute, § 2244(b)(3)(B)(C) and (D), authorizes the Court of Appeals to grant or deny the motion. Instead, the court issued an order concluding that § 2244(b) did not apply to McKenzie's petition because his two previous petitions were filed prior to the statute's amendment. App. 43a. The Court of Appeals dismissed the motion as unnecessary but, what is more, it made a further ruling that McKenzie had "facially met the gateway standard for permitting review of his claims in order to prevent a fundamental miscarriage of justice." In other words, the Court of Appeals ruled that McKenzie had satisfied the "actual innocence" standard of *Schlup v. Delo*, 513 U.S. 298, 322 (1995). The Court of Appeals went on to rule that McKenzie was entitled to "review of the merits of his two asserted claims," including the insufficiency claim. This ruling had no connection to his request for authorization to file a successive petition. The Court of Appeals had already ruled that McKenzie did not need authorization and, therefore, the issue was not properly before the court. In fact, the Court of Appeals lacked jurisdiction to make such a determination. The matter was before the court not to review the merits of McKenzie's claims at that time or the State's possible defenses but only to rule on the motion for authorization to file a third habeas petition. The Court of Appeals has no jurisdiction other

than that conferred upon it by statute. 28 U.S.C. § 1291, *et seq.*, *United States v. Walker*, 915 F.2d 1463, 1465 (10th Cir. 1990); *Kline v. Burke Const. Co.*, 260 U.S. 225, 234 (1922). The statutory authorization to consider McKenzie's motion to authorize the filing of his successive petition only allowed the Court of Appeals to grant or deny the motion.

28 U.S.C. § 2244(b)(3)(D) does not authorize the Court of Appeals to make the prospective ruling foreclosing potential defenses by the state by finding that the failure to rule upon the merits of McKenzie's claims would result in a miscarriage of justice. "[I]t is inappropriate for this court to act as a court of first impression, especially considering that the merits of [the State's defenses] have never been adjudicated." *Bovee v. Coopers & Lybrand CPA*, 272 F.3d 356, 365 (6th Cir. 2001).

As a result of this ruling, the District Court believed that it was barred from considering the State's defenses that McKenzie's claims were procedurally defaulted and that his petition was barred as an abuse of the writ:

> First, [the State] argues that this Court should dismiss the petition as an abuse of the writ or, in the alternative, because it fails to satisfy the gatekeeping requirements of 28 U.S.C. § 2244. The Sixth Circuit has already decided this issue, holding that McKenzie's successive petition is not barred as abusive. [The State's] argument, therefore, amounts to a request that this Court overrule the Sixth Circuit's holding that this Court should address the merits of [McKenzie's] claim. This Court cannot and will not so rule.
>
> [The State] also claims that the petition is barred from review by the doctrine of procedural default. Again, [the State] fails to acknowledge the Sixth Circuit's holding that this Court should address

> [McKenzie's] claims. To the extent that [McKenzie's] claims are procedurally defaulted, it is well established that procedural default is excused if a petitioner demonstrates that failure to consider his claim will result in a fundamental miscarriage of justice. *Coleman v. Thompson*, 501 U.S. 722, 750 (1991). The Sixth Circuit has already determined that [McKenzie] has demonstrated that his claims must be reviewed on the merits in order to prevent a fundamental miscarriage of justice. *McKenzie,* Slip Op. at 2. Therefore, [the State's] argument is meritless. [*McKenzie v. Warden,* no. 99-CV-70316-DT, Order Denying Respondent's Motion to Dismiss, E.D. Mich. March 20, 2000, pp 3-4]

The District Court, perceiving its review bound by the direction of the Sixth Circuit, adjudicated McKenzie's third habeas corpus petition as if it were the first one he had ever filed and ruled on the merits of the claims. The State was unable to obtain a ruling from the district court regarding the procedural defenses. The Court of Appeals' order in this case, without any discussion, divorced itself from the procedural history, including the fact that a different panel of the Court of Appeals had summarily rejected McKenzie's sufficiency claim years before, and thus required a review of his claims as if for the first time.

It was error for the Court of Appeals to make the determination that a failure to review McKenzie's claims would result in a fundamental miscarriage of justice and thereby prevent the State from making a record of procedural defenses in the district court. Significantly, the State could not raise this objection at the time the order was entered because, under 28 U.S.C. § 2244(b)(3)(E), the grant or denial of a motion for authorization to file a successive petition is not appealable and cannot be the subject of a petition for rehearing.

III. The Court of Appeals granted habeas corpus relief on a claim that had already been decided against the petitioner.

28 U.S.C. § 2244(b)(1) states: "A claim presented in a second or successive habeas corpus application under § 2254 that was presented in a prior application shall be dismissed." McKenzie's claim was presented in a prior application and was dismissed as an abuse of the writ. McKenzie was not relying on a new ground which was not previously available to him. *Broadus-Bey v. Diamond,* 264 F.2d 242, 243 (6th Cir. 1959).

McKenzie's insufficiency of the evidence claim was the same claim that had been presented and rejected in his second habeas action. It therefore could not have formed the basis for granting habeas relief. The order stating that the provisions of § 2244(b) could not be applied to McKenzie's third habeas petition is erroneous. In *In Re Byrd*, 269 F.3d 561, 570, (6th Cir. 2001), vacated on other grounds, 269 F.3d 585, the Court of Appeals found that the provisions of § 2244(b) apply to a habeas petitioner whose previous petition was filed prior to the enactment of the AEDPA so long as the application does not contract a petitioner's rights to file a successive petition. Under the prior § 2244(b) McKenzie was entitled to a second review of his sufficiency claim if he could show that the "ends of justice" required it. *Sanders v. United States*, 373 U.S. 1, 15 (1963). In *Kuhlmann v. Wilson*, 477 U.S. 436, 454 (1986), this Court developed the principle that "the ends of justice" standard requires a petitioner to make a colorable claim of factual innocence. See *Sawyer v. Whitley*, 505 U.S. 333, 338-339 (1992); *McCleskey v. Zant*, 499 U.S. 467, 495 (1991). Furthermore, to assert a credible claim of innocence, a petitioner must "support allegations of constitutional error with new reliable evidence -- whether it be exculpatory scientific evidence, trustworthy eyewitness accounts, or critical physical evidence -- that was not presented at trial." *Schlup* at 324.

McKenzie quite clearly did not make a colorable claim of factual innocence under this standard. Although the Court of Appeals found that constitutionally insufficient evidence was presented at trial, it did so with reference only to the trial record. McKenzie did not support his sufficiency of the evidence claim with new reliable evidence that was not presented at trial. The claim that was presented was exactly the same one that had been presented to the Court of Appeals a decade before. Nothing had changed in the interim other than the composition of the Court of Appeals panels. McKenzie was not entitled to review of his resurrected insufficiency claim even applying the old "ends of justice" standard. Application of the new § 2244(b) was appropriate under *In re Byrd*. The Court of Appeals was without authority to grant habeas relief based on the previously rejected insufficiency claim under this section.

CONCLUSION

For all the above-stated reasons, Petitioner respectfully requests this Honorable Court to grant Certiorari and reverse the decision of the United States Court of Appeals for the Sixth Circuit.

Respectfully submitted,

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